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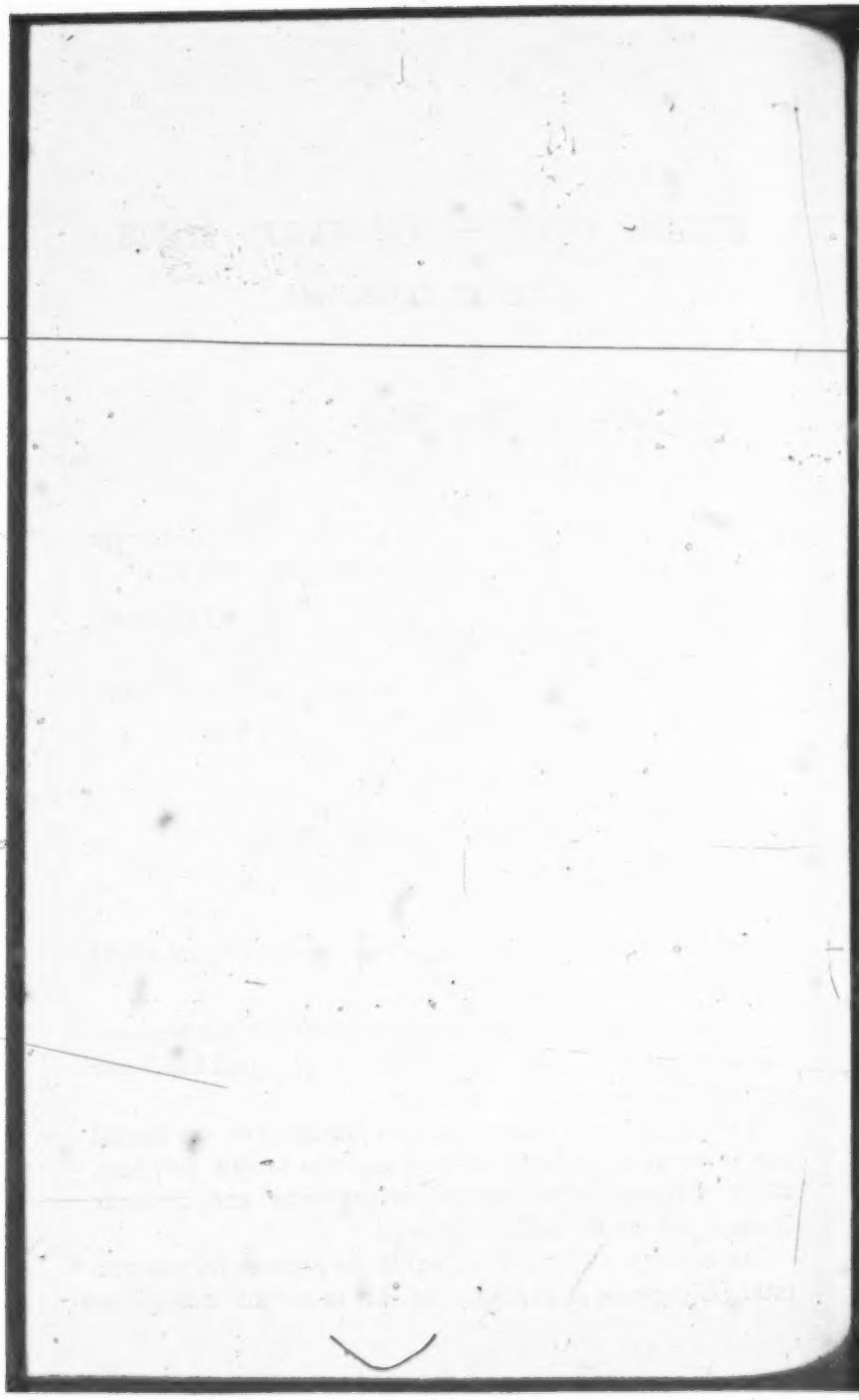

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 502

BERNARD EUGENE SMITH, ET AL., AS CO-PARTNERS, TRADING AND DOING BUSINESS UNDER THE FIRM NAME OF THOMSON & McKINNON,

Appellants,

vs.

J. N. LUMMUS, JR., AS TAX ASSESSOR OF DADE COUNTY, FLORIDA, ET AL.

PETITION FOR REHEARING.

To the Honorable, the Justices of the Supreme Court of the United States:

Come now the appellants and respectfully petition for rehearing as to the judgment of this Court, dated December 13, 1943, dismissing their appeal.

We respectfully suggest that the dismissal of the appeal was in error in certain material matters of law and fact, which matters, with petitioners' reasons and grounds thereon, are set forth below, to-wit:

The attempt of Florida to apply its general ad valorem intangible personal property tax law to certain intangibles

belonging to the New York Stock brokerage firm of Thomson & McKinnon raises these questions:

(1) *Do the intangibles have a business situs in Florida?*

(2) *If not, then is extra-territorial ad valorem taxation permitted as a substitute for an excise tax for soliciting business from within the state?*

Both propositions represent very substantial federal questions, where as here, the restraints of the Fourteenth Amendment of the Constitution are relied upon.

I.

The court overlooked the feature that the intangibles, on the facts established, are not in or localized in Florida according to decisions determining business situs.

A dismissal of the appeal, on the ground of absence of a substantial federal question, indicates the Court considered that the facts presented as to the intangibles in question showed them to fall clearly and unquestionably within the standard pattern of accounts receivable such as those derived from branch loan companies in a state, or from independent branch stores in a state, or from insurance loans based on loan capital sent into a state, or from sale of insurance, or from other independent businesses in a state conducted by a non-resident through agents there having discretion and having a substantial control of the capital which the accounts receivable replace and of the intangibles themselves.

In that respect this Court overlooked (1) the point that *all* of the facts of such a case are important; and (2) that the facts of this case show easily that the intangibles involved do not have a business situs in Florida.

The point as to close examination of *all* the facts surrounding the intangibles is important. One different fact or circumstance may prompt a contrary answer to that given in a case which, on cursory examination, appears to be within the pattern of a prior decision relating to business situs. This is particularly true in cases involving that question.[1]

It follows that determination of the question of business situs in any but the clearest case prompts full briefing and argument for its consideration by the Court.

On the matter of whether this case can be considered, on its facts, to be foreclosed by earlier decisions, we submit that it cannot. Here there were no loans made in the state, no loan capital sent into the state, no agents in the state with authority to make loans. These New York stock brokers do no brokerage business in the state—all exchanges are outside the state—there is no independent business in the state, all is ancillary to the brokerage business in New York. The agents in Florida are there to take and relay stock purchase and sale orders for customers. They solicit business. The New York firm, in New York, performs the (margin) stock purchase transactions on the New York Stock Exchange, which, and which alone, give rise to the accounts receivable from the customers which are sought to be taxed.

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[1] *Manufacturer's Trust Co.* v. *Hackett* (Conn.), 170 A. 792, 793.

In Re United Carbon Company Assessment (West Va.), 190 S. E. 546, 551, (1937). "We fully realize that at this time judicial determination of the question of the situs of intangible property for the purpose of taxation cannot be said to have reached the point where any settled and controlling rule can be laid down. Between those cases where the matter of situs renders such property clearly taxable and those cases where the lack of situs renders such property clearly not taxable, there is a 'twilight zone' into which, naturally, most of the controverted cases fall. The case before us belongs to that category, and it may well be that a slight difference in the showing upon which our conclusion is based would impel us to the opposite determination."

There are four types of stock brokerage transactions solicited by the agents in Florida: (1) purchases not on margin (where the customer supplies the full purchase price to be paid by the broker for the stock), (2) margin purchases, (3) sales, and (4) short sales. It is only on the second of those, the margin purchases, that the accounts receivable arise.

Those accounts receivable do not result from any loan of money *to* the customer, but from advancing a part of the price of the stock.

When the firm makes the purchase for the customer, in New York (and the firm is not obligated to make the purchase even after the customer has forwarded an order or request) the Exchange purchase contract which the broker makes is followed by delivery of the stock to the broker, who then pays the purchase price, using the portion or "margin" which the customer has posted for the purpose, and advancing the balance out of the general capital of the firm in New York. The resulting obligation of the customer to repay the firm for that advance is created then, and not before then, on quantum meruit by custom of the trade, and is not evidenced by any written note or agreement to repay. The stocks obtained are held in New York as security by the brokers, and when repayment is enforced it is by sale of the security—never by suit against the customer.

Those facts are sufficient to illustrate the extra-territorial nature of the intangibles. The accounts receivable just described are the objects of taxation of Florida.

No direct legislation is involved. The attempt to tax is that of county taxing officials, acting under direction of the State Comptroller, by seeking to apply to these intangibles the general ad valorem tax of Florida for intangible personal property.

The decision that no business situs existed in Florida for those intangibles was easy for the Florida Court when it

first considered the case, on the first appeal. By unanimous opinion it held that a business situs did not exist.[2]

On the second appeal, after the evidence had come in, the Florida Court (with one new member who had not heard the first appeal) switched over, and by a four to three decision held that the tax should stand. The court did not base its holding on the view that any of the above stated facts were not proved, but it took the view that the intangibles in question were *in* Florida because of certain factors which appeared from the bill at the outset, and which would exist in every case where any business is solicited in another state. The view of the Florida Court was that by soliciting business from people in Florida, the credits, which later arise from the transactions in New York, must be considered to have "originated" in Florida. That much can be said of any solicited business, and, of course, is not the test. It has no bearing on the question of business situs. The Florida Court's reasons for its conclusion as to the intangibles "originating" in Florida were (a) because the customers live there, and (b) because Florida law protected the agents, and (c) Florida law would settle disputes (if any) between the firm and the Florida people from whom the business transacted in New York was solicited.

That narrows down to a ruling by the Florida Court that if a non-resident has agents soliciting, in Florida, business of a kind which results in accounts receivable when the solicited business is performed out of the state for the customer's benefit, then the accounts receivable can be

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[2] *Hunt* v. *Turner*, 54 Fla. 654, 45 So. 509, the leading Florida case on business situs has been followed consistently, and the Florida Court adhered to it on the first appeal in the case, in 6 So. (2d) 625, saying, "Scrutiny of the plan of operation of the agencies in Florida clearly indicates that the property in question does not fall within the exception described in Hunt v. Turner, supra."

taxed by Florida, even though they do not have a business situs in Florida.[5]

We have taken the liberty of including the above discussion of the facts of the case and of the Florida decision appealed from in order to show this Court (1) that the facts not only fail to fall within any established pattern for business situs of intangibles, but show the contrary very clearly, and (2) that the Florida Court itself concedes those determining facts and does not purport to show a business situs for the intangibles (as in fact it cannot, because of its own decisions on that question), but nevertheless seeks to justify ad valorem taxation of the intangibles on other entirely novel grounds.

Assuming intangibles result from business transacted in New York for a Florida customer, whose business or account was solicited by the New York business firm through a soliciting agent in Florida, and assuming that the intangibles in question are not otherwise in or localized in Florida, does the fact alone that the business was solicited from residents of Florida sanction ad valorem taxation of such intangibles under a general tax law?

Is that question foreclosed by the cases cited by this Court's order?

When the due process and equal protection of the laws clauses of the Federal Constitution are invoked in seeking relief against an illegal exaction, is there not involved a substantial Federal question?

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[5] That is not only an attempt to tax property which is not within the state, but also amounts to a flagrant denial of equal protection of the laws. Before a Florida resident can avoid taxation based on his domiciliary ownership as to intangibles which arise from business conducted by him through agents outside the state and which are held out of state, he must show that they were used in the other state as an integral part of a separate independent business conducted there by agents with discretion and that they were not within his power to recall to Florida (*Hunt* v. *Turner*, 54 Fla. 654, 45 So. 509).

II.

The court overlooked the fact that the Florida Court decided the case without basis other than the assumption that a "trend" now allows extra-territorial ad valorem taxation as a substitute for a license tax for soliciting business.

Absent a Florida business situs for these intangibles, it is, of course, obvious that the state may not reach beyond its borders to extend or apply its property tax law to them.

This Court, by dismissing the appeal, has failed to take into consideration the point that while use of certain facilities of a state (such as by soliciting business through local agents) may be reason enough to impose an appropriate tax, it is no basis for imposing an ad valorem tax on foreign-held property of a non-resident over which the state has no territorial jurisdiction.

A license tax can be and in fact is imposed by the State, County and City governments in Florida, for the privilege of using the facilities of the state for furnishing market quotations and like conveniences to the public and for soliciting and relaying to the firm in New York the customers' orders for Stock Exchange transactions.[4]

In addition, the state can and does tax all tangible property of the firm which is located in Florida, and taxes the intangible (cash) of the firm which may happen to be there on January 1, the determining date.

If the taxing officials feel that the privilege of soliciting business from Florida should cost more than is now paid in license taxes, the remedy is by legislative increase of excise

[4] The firm pays license taxes, and pays taxes on its property in Florida. On the first appeal, the Florida Court said: "We emphasize that appellants allege they pay without complaint all ad valorem and excise taxes and likewise all taxes on intangibles that have a taxable situs in this state. The effect of what we have written is only to relieve them from the burden on intangibles the situs of which is fixed in the foreign state."

or license tax—not by attempting to apply the state's ad valorem intangible personal property tax to property of the firm which is *not* within the state.

The "trend," if there is any such thing, of recent decisions relating to state taxation is a fuller expression of the elemental principle that for use of a state's facilities a tax appropriate in kind and amount can be exacted by the state.

That simply means that *all* acts of a non-resident performed in a state for which it is proper and reasonable to impose an excise or license can be made subject thereto. It also means that *all* property *which is in the state* may be reached by a property tax. Those are very different propositions from one contending in effect that nowadays a state can exceed its territorial jurisdiction by taxing property *which is not in the state* because its owner has done an act in the state which could be (and is) the subject of a license or excise tax.

Moreover, if a license tax is to be imposed for soliciting business in the state, or an excise tax on the act of taking and relaying orders for New York Stock Exchange transactions, then such tax must have some fair relation to the amount or volume involved. We pointed out above that there are four types of purchase and sales transactions solicited, and that these intangibles result from only one out of the four. The amount of such intangibles, or the number of the margin purchase transactions made in New York which give rise to them, has no relation whatsoever to the number or volume of other types of purchases or sales handled by the firm as a result of solicitation of such business.

Therefore, it is clear beyond the need for any further comment, that as to the intangible property of the non-resident partnership which is not itself localized in Florida so as to give that state territorial jurisdiction for a property

tax thereon, the fact that the "order" for the New York Stock Exchange brokerage transaction out of which it arose "originated" from Florida, by having been solicited by the firm's agents there, can and does result in license taxes, but cannot serve to permit Florida to impose a property tax on property not within its borders. The state's attempt to do so is what would be done if Federal Constitutional limitations did not intervene.

The Florida Court's error, in supposing that language of other decisions which encourages proper taxation means that unconstitutional exactions should be sanctioned, is a basic and patent mistake.

III

The Court has overlooked the effect of the Florida decision.

If this decision is allowed to stand, then all prior decisions regarding business situs of intangibles will have no further effect. Gone will be the test that the intangibles must be in and used in the state, and the requirement that the equivalent property or capital from which they were derived must be in and used in the state in a regular independent business.

The requirement that the agents in the state have control over the intangibles or the transactions from which they arose, and otherwise act there as a separate business will be gone. Gone will be the recognized rule that the accounts receivable must have a permanency of location in the state so as to be a part of the mass of property in the state.[5]

The view of this Court, as expressed in *Curry* v. *McCanless*, 307 U. S. 357, 368, that it is the nature of the *use of the*

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[5] *Gulley* v. *C.I.T. Corporation* (Miss.), 150 So. 367. "* * * we take a business situs to be connected with the idea of more or less permanency of location of such credits, or with a purpose to incorporate them when collected into the mass of property of the state."

intangibles in the state which determines business situs will be done away with. [6]

In this Florida case the intangibles never have been and never will be in the state, or used in the state.

The result, as it affects the doctrine of business situs, will be that a state may tax all intangibles of a non-resident firm which can be traced to business it conducts (outside the state) on orders solicited in the taxing state, even though the intangibles in question clearly have no business situs in such state.

The power of the state of Florida to tax such foreign-held property, in the face of the Fourteenth Amendment to the United States Constitution, presents a novel and most substantial federal question.

Wherefore, on the grounds and reasons assigned above, the appellants respectfully petition for rehearing as to the order of December 13, 1943, by which this appeal was dismissed.

CHARLES A. CARROLL,
GEORGE H. SALLEY,
Counsel for Petitioners-Appellants.

Certificate of Counsel.

The undersigned, Charles A. Carroll, one of the attorneys for the Petitioners named and making the foregoing Petition for Rehearing, hereby certifies that the Petition is filed in good faith, and not for the purpose of delay.

Charles A. Carroll.

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[6] Although involving an excise tax, the opinion in *Curry* v. *McCanless*, supra, made one reference to the power of a state to levy a property tax on intangibles which had acquired a business situs apart from the place of domicile. In its reference to that situation the opinion recognized that the intangibles must be used in the business in the other state and cited certain of the Louisiana cases and other decisions which fully bear out our contentions as to the requisites for a separate business situs.